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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. LAVELL GRAVES, Defendant and Appellant.	C083516 (Super. Ct. No. 15F03918)

Defendant Lavell Graves appeals from a judgment entered after a jury verdict finding him guilty of criminal threats (Pen. Code, § 422—counts one and two);[1] witness intimidation (§ 136.1, subd. (c)(1)—counts three and four); assault with a semiautomatic firearm (§ 245, subd. (b)—counts five, six and seven); possession of a firearm by a felon (§ 29800, subd. (a)(1)—count eight); and unlawful brandishing of a firearm (§ 417, subd.

[1] Undesignated statutory references are to the Penal Code.

(a)(2)—counts nine, ten and eleven). The jury also found true that defendant used a firearm in counts one through four (§ 12022, subd. (a)(1)) and that he had used a firearm in counts five through seven (§ 12022.5, subds. (a) & (d)).

Defendant argues: (1) insufficient evidence supports his criminal threats conviction in count two; (2) defendant's trial counsel was ineffective for not making a section 1118.1 motion to dismiss counts five through seven at the close of the People's case-in-chief; and (3) that remand is necessary so the trial court may exercise the sentencing discretion authorized by the passage of Senate Bill No. 620 (2017-2018 Reg. Sess.) to possibly strike the firearm enhancements. The People concur that a limited remand is needed regarding the firearm enhancements and oppose defendant's remaining arguments.

We shall remand for the limited purpose of allowing the trial court to exercise its discretion as to the firearm enhancements and otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

We limit these facts to those necessary to determine defendant's contentions on appeal.

The People's Case-in-chief

P.B. testified that he is a security guard at a gated community of single-story homes and duplexes. He was working on July 4, 2015, when he received a call around 11:00 a.m. P.B. investigated a domestic disturbance between defendant and a woman,[2] but left about 20 minutes later after the woman at the scene said she was fine.

P.B. received another call around noon regarding a person walking in the street who was cursing and had a gun in his waistband. The person's clothing matched what

[2] This woman was Ariel Mathis, who testified on defendant's behalf as discussed *post*.

defendant was wearing when P.B. encountered him earlier, and P.B. went to defendant's home to investigate. P.B. approached defendant, who stated, "What the fuck do you want?" P.B., seeing the gun, put up his arms and asked, "Do we have a problem, bro?" Defendant responded, "I don't give a fuck. I'll shoot every mother fucker here." P.B. stated, "We don't have any problems." Defendant responded, "Fuck security, fuck the [neighborhood]." At some point defendant pulled out the gun, cocked it, pointed it sideways at P.B.'s neck, and threatened, "I'll light every mother fucker in here." P.B. explained that racking the gun is pulling the slot back, and P.B. recalled hearing "a distinct racking of the gun." It sounded like metal. Defendant pointed the gun at P.B. for approximately 30 seconds. "It was an all-black gun. There was no orange tip or anything." P.B. knew the difference between a revolver and a semiautomatic gun, and defendant's gun was "semiautomatic." P.B. believed it was a real gun because it did not have an orange tip, was all metal, and glinted in the sun.

A Volkswagen Jetta drove up, and defendant, still pointing the gun at P.B., walked over to it and got in. P.B. saw the car drive away, but it stopped near two women who were outside with a baby.[3] Defendant pointed the gun at the women and said, "Call the police again and see what happens." He did this from inside the car by putting the gun outside the window, directed at both women. P.B. testified defendant left and circled back later, but the car did not stop.

B.M. testified she was at home on July 4, 2015, when she saw defendant arguing with a woman around 11:00 a.m. in a driveway. B.M. went inside. About noon, E.A. asked her to retrieve the baby from the pool out front because there was someone outside with a gun. B.M. went outside and saw defendant "brandishing the firearm and

[3] These women were B.M. and E.A., sisters who lived near defendant but did not appear to have any relationship with him.

threatening the location where [they] lived . . . and daring anyone to do something about it." B.M. testified the gun "looked like a black handgun." B.M. confirmed she knew what a revolver was and the kind of guns police officers carry and then stated, "It definitely did not look like a revolver."

B.M. later saw defendant arguing with a security guard and witnessed defendant point the gun at that security guard, who was a few feet away. Defendant got into a silver Jetta, but got out and pointed the gun at B.M. and the baby when that car stopped at the stop sign. Defendant was cursing "F the [neighborhood], f you—," and B.M. believed she may have flipped defendant off.[4] Defendant pointed the gun at B.M., who was holding the baby. B.M. was "shocked and angry," but also afraid defendant might shoot her.[5] Defendant also pointed the gun at E.A., who was about four feet away. B.M. testified she thought the comment concerning calling the cops was more directed at her sister because her sister had called the police. Defendant left and circled back later, but the car did not stop.

E.A. testified she heard a domestic disturbance at about 11:00 a.m. on July 4th between a man and woman. The sheriff's department responded, handcuffed defendant, but later released him, and ultimately, E.A. saw the woman pack her things and leave. Around noon, E.A. saw defendant, who was very upset, walking in the street, yelling, cussing, and "messing with his pants." Defendant had an altercation with security and then got into a silver Jetta. The car stopped, and defendant opened the door and pointed the gun at B.M. and the baby. E.A. testified she believed it was a real gun; it was black

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[4] B.M. later clarified she flipped off defendant after he was stopped, but before he got out of the car.

[5] B.M. also testified they moved out of the neighborhood because they were afraid defendant would be released and that both B.M. and her sister were afraid even after July 4th. The timing and rationale for their move was confirmed by E.A.'s testimony.

and did not have any orange on it. E.A. confirmed she knew the difference between a revolver and the kind of guns police use on TV shows. When asked whether defendant's gun was the cowboy or police-style gun, E.A. responded, "I'm going to go with the police-style gun."

Deputy Nick Sheehan testified to responding to the scene on July 4 and interviewing E.A. who reported defendant pointing the gun at her and stating, "Call the cops again and see what happens." Sheehan later returned to defendant's house, which was searched for weapons, but no gun or air guns were recovered. Deputy James Spurgeon testified that no gun was found, but that he "believe[d] there was like a toy gun or Airsoft gun found," but he did not recall where it was found or whether he saw it. Spurgeon remembered "Deputy [Devin] Folk and Deputy Sheehan said that they had found a toy gun but no real gun." Spurgeon recalled "them saying [it was] like an Airsoft gun." When asked whether those guns have orange tips, Spurgeon responded, "Some of them have it, yeah."

The Defense Case

Defendant first presented the testimony of his two girlfriends at the time of the incident: Ariel Mathis and Rebecca Martin. Mathis testified that defendant is the father of her two children. On July 4th, she and defendant had a fight, and Mathis called the police to be escorted from the property. Mathis threw multiple items onto the front lawn, including a plastic Airsoft gun.[6] Authorities ultimately escorted Mathis (then nine months pregnant) and her three-year-old son from the property. Mathis waited for the police to leave and then went back to watch and see if anyone would come to pick defendant up. Mathis was arguing with defendant on the phone when P.B. approached

[6] A photograph of defendant with two Airsoft guns showed each gun had an orange tip, which Mathis conceded would be visible to anyone the gun was pointed at.

him. Mathis denied that defendant threated P.B. and stated defendant had the Airsoft gun from the front yard in his pants, although she did not see him pick it up. Mathis denied defendant ever held the Airsoft gun in his hand, that they had any guns in the house, or that she had ever seen defendant with a handgun. Defendant left in a silver Jetta.

Martin testified defendant called her to come get him so that he could look for his child. She observed defendant speaking to security and denied that defendant had a gun. Martin told security she was taking defendant with her, and they left. Martin testified she "would not have let someone in [her] car with a gun." Martin was flipped off by two females in a yard, but defendant did not do anything in response. He did not threaten "some girls in a yard."

Defendant also testified. He explained he had been out all night with Martin, which upset Mathis, and they argued. Mathis threw multiple items onto the front lawn, including defendant's Airsoft pistols. Defendant confirmed the Airsoft pistols in a picture were the pistols that Mathis threw on the ground. Authorities came to the house and allowed Mathis to leave with defendant's son over his objection and despite his having legal custody. After she left, defendant picked up the items from the yard, and without thinking about it, placed the Airsoft pistol "on [his] hip."

Shortly thereafter, security came back to his house, and defendant was very upset, mostly because Mathis had taken his son. He called Martin to come get him, but was on the phone with Mathis when P.B. returned to his house. Defendant admitted "[going] off" on P.B., but denied making any "references to shooting and things like that." Defendant still had the Airsoft pistol in his waistband, but did not pull it out or threaten P.B. with it. The Airsoft pistol still had the orange paint on it, and defendant conceded if it was pointed at someone, that person would see the orange tip. The Airsoft pistol could

not be "racked." Defendant left with Martin. Before leaving, he placed the Airsoft pistol inside a bag[7] and threw the bag inside the house.

Defendant was flipped off by a neighbor, but denied yelling at her or pointing a gun at her. He did not see Mathis's Toyota Highlander parked on the street. Defendant believed police recovered an Airsoft pistol when they searched his house. He also claimed Mathis took all his belongings before his release on July 5th, including his Airsoft pistol.

The People's Rebuttal

Deputy Ken Gouveia testified to participating in a protective search of defendant's residence on July 4th where no gun or replica of a gun was recovered. Had a replica been identified, it would have been seized and booked into evidence. However, "nothing of substantial evidence occurred at the time of pickup." Gouveia further testified about what makes a handgun semiautomatic and the sound that racking a slide makes.

Deputy Folk also testified to participating in the protective sweep, which did not yield a firearm, and Folk did not remember finding anything like a replica or Airsoft firearm. No report was written about either a firearm or Airsoft firearm because none was found.

DISCUSSION

1.0 Substantial Evidence Supports the Conviction in Count Two

Defendant contends insufficient evidence supports the jury's verdict on the criminal threats conviction in count two. We disagree.

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[7] Defendant later testified to separately throwing the Airsoft pistol in the house after he threw in the other belongings.

To establish criminal threats under section 422, the prosecution must prove: (1) the defendant willfully threatened to commit a crime causing death or great bodily injury to the victim; (2) the threat was made with the specific intent that it be taken as a threat—even absent intent to carry out the threat; (3) the threat " 'was, "on its face and under the circumstances . . . , . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat" ' "; (4) the threat caused the victim " ' "to be in sustained fear for his or her own safety or for his or her immediate family's safety" ' "; and (5) under the circumstances, the fear was reasonable. (*In re George T.* (2004) 33 Cal.4th 620, 630.)

Where the sufficiency of evidence is challenged on appeal, we review the record in the light most favorable to the judgment, to determine whether it discloses substantial evidence—evidence that is "reasonable, credible and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Snow* (2003) 30 Cal.4th 43, 66.) We draw all available inferences supporting the jury's verdict. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1382.) " 'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.' " (*People v. Hicks* (1982) 128 Cal.App.3d 423, 429, quoting *People v. Hillery* (1965) 62 Cal.2d 692, 702.)

Here, defendant challenges the evidence supporting the first and fourth elements of his criminal threat conviction for conduct related to B.M. Specifically, he argues he did not threaten B.M., nor did B.M. suffer "sustained fear." We find substantial evidence supporting the jury's implied determination on these elements.

1.1 *The Threat to B.M.*

Here, defendant threatened B.M. while pointing a gun at her, stating, "F the [neighborhood], f you—." He also stated, "Call the police again and see what happens."

Defendant argues the second threat was to E.A., not B.M., and therefore, substantial evidence does not support his conviction for threatening B.M. However, nothing in the threat concerning the police limits itself to E.A.; for example, defendant did not call E.A. by name, identify her by clothing, or otherwise limit his threat to the person holding the phone. While B.M. perceived the police threat as being more directed at her sister, the jury could have reasonably inferred defendant was threatening both women, who were only four feet away from each other in the same yard, which was the way P.B. perceived the threat. E.A.'s perception that defendant was pointing the gun at her sister and baby, and E.A.'s physical location in front of B.M. and the baby further supports this.

While a single threat against the victim and the victim's family, but heard only by the victim, constitutes a single violation of section 422 (*People v. Wilson* (2015) 234 Cal.App.4th 193, 201), here both B.M. and E.A. were subject to defendant's threat. (See *People v. Solis* (2001) 90 Cal.App.4th 1002, 1008-1009 [defendant convicted of two violations of § 422 for threats on answering machine directed at girlfriend and "everybody" heard by the victim and her roommate]; *id*. at pp. 1024-1025 [concluding the multiple-victim exception to § 654 applies to § 422 violations].) We therefore reject defendant's argument that there was no evidence his threat, "Call the police again and see what happens," was directed at B.M.

1.2 *B.M.'s Sustained Fear*

Defendant also contends that B.M. did not suffer sustained fear as a result of his threat. Here, B.M. testified that she was mostly "shocked and angry," but also afraid defendant might shoot her. That B.M. actually suffered *sustained* fear is demonstrated by her testimony that they moved away from the neighborhood shortly after the incident because they were afraid defendant would be released and that her fear continued after

July 4th.[8] Fifteen minutes of sustained fear has been held sufficient to support a section 422 conviction. (*People v. Fierro* (2010) 180 Cal.App.4th 1342, 1348-1349 [fear continuing up to 15 minutes after one-minute encounter was "sustained" for purposes of § 422].) Moving days later because of a fear arising from an encounter with defendant amply meets this requirement.

2.0 Ineffective Assistance of Counsel

Defendant contends his counsel was ineffective for not making a section 1118.1 motion to dismiss counts five through seven, for violations of section 245, subdivision (b) at the close of the People's case-in-chief. Specifically, he argues the People had not provided substantial evidence that the gun utilized in the assaults was a semiautomatic firearm and that defendant had the "present ability to apply force" as required for a section 245, subdivision (b) conviction. We disagree.

"To show ineffective assistance of counsel, defendant has the burden of proving that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." (*People v. Kelly* (1992) 1 Cal.4th 495, 519-520.) A court considering a section 1118.1 motion for acquittal uses the same standard as an appellate court reviewing a judgment of conviction: "whether there is substantial evidence of the existence of each element of the offense charged." (*People v. Wong* (1973) 35 Cal.App.3d 812, 828.) "In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses

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8 In fact, while B.M. denied still being afraid *because of the incident* at the time of trial, she did not want to testify because "[d]epending on the turnout or the outcome, people get upset, emotions get high, and I'm more afraid for my safety," showing B.M. still feared defendant.

substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11 (*Rodriguez*).)

Section 245, subdivision (b) provides, "Any person who commits an assault upon the person of another with a semiautomatic firearm shall be punished by imprisonment in the state prison for three, six, or nine years." The statute does not define "semiautomatic firearm," but our Supreme Court has described the term in other contexts as referring to a gun that " 'fires once for each pull on the trigger and reloads automatically, but requires the shooter to release the trigger lever before another shot can be fired.' " (*In re Jorge M.* (2000) 23 Cal.4th 866, 874, fn. 4, quoting Walter, Rifles of the World (2d ed. 1998) p. 498.) This is consistent with the trial court's instructions to the jury, which provided, "A semiautomatic firearm extracts a fired cartridge and chambers a fresh cartridge with a single pull of the trigger." (See CALCRIM No. 875.)

As to the "present ability to apply force" argument, pointing an unloaded firearm is not enough to sustain an assault conviction; for our purposes, a defendant has the present ability to apply force with a firearm if the firearm is loaded. (*Rodriguez*, *supra*, 20 Cal.4th at p. 11, fn. 3.) "California courts have often held that a defendant's statements and behavior while making an armed threat against a victim may warrant a jury's finding the weapon was loaded." (*Id*. at p. 12.) Thus, where defendant's statements and behavior support a finding that the gun was loaded, reversal is not warranted even where the defendant affirmatively testified that it was not. (*Id.* at pp. 12-13 [discussing *People v. Montgomery* (1911) 15 Cal.App. 315, 317, wherein the defendant returned to a fight with a gun and exclaimed, " 'I have got you now' " as supporting a finding that the gun was loaded despite contrary testimony].)

Here, the evidence presented in the People's case-in-chief supports the jury's rational inferences that defendant's gun was a semiautomatic and that it was loaded.

2.1 *The Gun Was a Real Semiautomatic Firearm*

P.B. testified that defendant cocked the gun and pointed it sideways at P.B.'s neck. P.B. recalled hearing "a distinct racking of the gun," and explained that racking the gun is pulling the slot back. It sounded like metal. P.B. testified, "It was an all-black gun. There was no orange tip or anything." P.B. knew the difference between a revolver and a semiautomatic gun, and defendant's gun was "semiautomatic."[9] P.B. believed it was a real gun because it did not have an orange tip, and it was all metal and glinted in the sun. This constitutes substantial evidence that defendant's gun was a real semiautomatic firearm.

2.2 *The Gun Was Loaded*

Within an hour of a domestic disturbance ending in the woman packing her things and leaving, defendant was walking the neighborhood cursing with a gun in his pants. P.B. contacted defendant, who drew and cocked the gun, pointing it at P.B.'s neck. P.B. described defendant "pull[ing] the slot back" on the gun, resulting in a metallic clicking sound. Defendant exclaimed, "Fuck security, fuck the [neighborhood]." P.B. also described defendant's threats to "shoot every mother fucker here" and that he would "light every mother fucker in here." Further, P.B. testified regarding defendant's threat to B.M. and E.A., "Call the police again and see what happens."[10] The act of racking the gun and defendant's subsequent threats to specific victims would be meaningless unless defendant's gun was loaded. This constitutes substantial evidence supporting the

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[9] That the gun was real and similar to the kind of gun used by police is supported by the testimony of B.M. that it looked like "a black handgun" and "definitely did not look like a revolver." E.A. also knew the difference between revolvers and police-type guns and identified the gun as a "police-style gun." P.B. and E.A. also testified the gun did not have orange paint, which Deputy Spurgeon testified could be on an Airsoft gun.

[10] That defendant made this threat is also supported in the testimony of B.M.

jury's inferences that defendant's gun was loaded, and thus, that he had the present ability to apply force. (*Rodriguez, supra*, 20 Cal.4th at pp. 12-13.)

Having determined the People's case-in-chief contained substantial evidence meeting the elements required for a section 245, subdivision (b) conviction, we reject defendant's ineffective assistance of counsel claim. (*People v. Weaver* (2001) 26 Cal.4th 876, 931 ["Counsel is not ineffective for failing to make a frivolous motion."], questioned on another ground in *People v. Baldwin* (2010) 189 Cal.App.4th 991, 1001.)

3.0 The Firearm Enhancements

Defendant contends remand is necessary so that the trial court may exercise the sentencing discretion authorized by the passage of Senate Bill No. 620. The People concur.

On October 11, 2017, the Governor signed Senate Bill No. 620 (2017-2018 Reg. Sess.), which amended subdivision (c) of section 12022.5 and subdivision (h) of section 12022.53, effective January 1, 2018 (Stats. 2017, ch. 682, §§ 1-2, respectively), to permit a trial court to strike a firearm enhancement: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law."

We agree with the parties that Senate Bill No. 620's amendment should be applied retroactively, and thus, remand is necessary to allow the trial court to exercise its newly authorized sentencing discretion. (See *People v. Woods* (2018) 19 Cal.App.5th 1080, 1089-1091 [amendment to § 12022.53 applied retroactively].)

DISPOSITION

We remand to allow the trial court to exercise its sentencing discretion under section 12022.5, subdivision (c) concerning whether to strike the firearm enhancements. The judgment is otherwise affirmed.

BUTZ, J.

We concur:

HULL, Acting P. J.

MAURO, J.